No. 4857

IN THE

# United States Circuit Court of Appeals

17

**For the Ninth Circuit**

EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND, a corporation,

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY, a corporation,

Defendant in Error.

## Brief of Plaintiff in Error

Upon a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

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GLASS & PRUDHOMME CO., PRINTERS, PORTLAND.

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## STATEMENT OF THE CASE

This action is based upon an insurance policy or contract entered into between the plaintiff in error and the defendant in error prior to the happening of an injury to one Freeborough, an employee of defendant in error.

The policy in question is a liability policy a copy of which is attached to the complaint and is found in the transcript at page 12.

Freeborough was an employee of the defendant in error, and the principal work of the said injured man was at one of the shops of the defendant in error, situated in Portland on the east side of the Willamette River, in which there was power driven machinery.

The defendant in error also occupies a building known as the Electric Building, situated upon the west side of the river in Portland, Oregon, at the corner of Alder and Broadway Streets, approximately a mile from the shop where Freeborough was usually employed. On the day of the accident to Freeborough he had been sent from the shop on the east side of the river to the Electric Building on the west

side of the river to get certain parts of electrical machinery and while taking the said parts out of the basement of the Electric Building to the ground floor upon an elevator, his foot protruded over the floor of the elevator to such an extent that it was caught by an I-beam as the elevator approached the floor and his foot and leg were so injured that the leg had to be amputated below the knee and the said Freeborough claiming negligence on the part of the defendant in error brought an action against it to recover damages on account of said injury. After said action had been brought the defendant in error tendered the complaint to the plaintiff in error requesting that it defend the action and pay any judgment, if one was rendered, up to the limit of the policy.

The plaintiff in error claimed that there was no liability under the terms of the policy on account of the accident to Freeborough because he was subject to the provisions of the Oregon Compensation Law and returned the complaint to the said defendant in error and refused to defend the action.

Thereafter the defendant in error confessed judgment in favor of the said Freeborough in the sum of $8000.00 and paid the said $8000.00, $7500.00 in cash and $500.00 by an order upon the chief surgeon of the defendant in error for medical services as might be necessary on account of the said accident.

The question in issue in this case and the one to be tried upon this appeal is whether or not the policy of insurance covered said injury to Freeborough.

There is in the State of Oregon a Workmen's Compensation Law. In hazardous occupations all parties are **automatically under the compensation law of the State of Oregon,** but the employer or employee may file a notice with the State Compensation Commission of the State of Oregon to the effect that he desires to be **"relieved of certain of the obligations"** therein imposed; said compensation law reading as follows:

Olson's Oregon Code, Section 6614:

"ELECTIVE PRIVILEGE OF EMPLOYERS NOT TO ACCEPT BENEFITS OF ACT.

All persons, firms and corporations engaged as employers in any of the hazardous occupations hereafter specified, shall be subject to the provisions of this act; provided however, that any such person, firm or corporation **may be relieved of certain of the obligations** hereby imposed, and shall lose the benefits hereby conferred by filing with the commission written notice of an election not to be subject thereto in any manner hereinafter specified, provided, however, that where an employer is engaged in a hazardous occupation as hereinafter defined, and is also engaged in an-

other occupation or other occupations not so defined as hazardous, he shall not be subject to this act as to such nonhazardous occupations, nor shall his workmen wholly engaged in such nonhazardous occupations be subject thereto except by an election as authorized by section 6636; provided, however, that employers and employes who are engaged in an occupation partly hazardous and partly nonhazardous shall come within the terms of this act the same as if said occupation were wholly hazardous."

Relative to the elective privileges of the employees, Section 6615, of the Oregon Code reads as follows:

"ELECTIVE PRIVILEGE OF EMPLOYES—

All workmen in the employ of persons, firms or corporations who as employers are subject to this act shall also be subject thereto; provided, however, that any such workman may be relieved of the obligations hereby imposed and shall lose the benefits hereby conferred by giving to his employer written notice of an election not to be subject thereto in the manner hereinafter specified. * * * ."

No notice of election was given by said Freeborough.

Hazardous employments are described under the Oregon Code as follows, (Section 6617):

"The hazardous occupations to which this act is applicable are as follows: (a) Factories, mills and workshops where power-driven machinery is used."

If the employer desires to be **"relieved of certain of the obligations"** imposed by the compensation law he may do so as is prescribed in Olson's Oregon Code, Section 6620, which is as follows:

"ELECTIVE PRIVILEGE OF EMPLOYER NOT TO ACCEPT ACT—LOSS OF DEFENSE OF FELLOW SERVANT, CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK. Any employer engaged in any of such hazardous occupations who would otherwise be subject to this act, may on or before June fifteenth next following the taking effect of this act, file with the commission a statement in writing declaring his election not to contribute to the industrial accident fund hereby created, and thereupon such employer shall be relieved from all obligations to contribute thereto, and such employer shall be entitled to none of the benefits of this act, and shall be liable for injuries to or death of his workmen, which shall be occasioned by his negligence, default or wrongful act, as if this act had not been passed, and in any action brought against such an employer on account of an injury sustained after June thirtieth

next following the taking effect of this act, **it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that the negligence of the injured workman, other than his wilful act, committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury."**

In Agreement IV. of said policy it is provided that the policy covers bodily injuries including death sustained by any person while within or upon the premises of the assured by reason of the occupation, use, maintenance, ownership or control of the premises by the assured, except as is provided for in Agreement five. Agreement five reads:

> **"This policy shall not cover injuries or death * * * to any employee of the assured under any Workmen's Compensation Act or Law."**

In the declarations attached to said policy, a copy of which is in the Transcript, it is provided in Item 3 that the premises covered is the Electric Building at the northeast corner of Broadway and Alder Streets, including sidewalks, surrounding same, in Portland, Oregon, and covering an office building, 100 x 100 feet, having nine floors and that the yearly estimated remuneration of employees was $6000.00.

It was also provided in Item 3 that **certain specified employees** were covered by the policy namely:

> "Those engaged in the maintenance, care and upkeep of the building at five cents per $100.00."

which means five cents for every $100.00 of wages paid and refers to the premiums charged for the coverage of such specified employees whose wages were **estimated** at the sum of $6000.00.

It is admitted that the said Freeborough was not engaged in the maintenance, care or upkeep of the said Electric Building, in which he was hurt, nor was his remuneration included within the $6000.00 estimated remuneration of said specified employees.

The policy also provided (see Condition A):

> "The premium for this policy is as expressed in Item 3 of the Declarations except as this policy covers injuries and/or death to employees of the assured, in which case as to such coverage the premium is based upon the entire remuneration, by which term is meant all salaries * * * earned during the policy period by all persons employed by the assured in said business operations, as expressed in Item 3 of the Declarations. * * * * *"

The plaintiff in error claims that said Freeborough was **under** the Workmen's Compensation Law

of the State of Oregon, notwithstanding the said election of the defendant in error not to pay compensation and to be **"relieved of certain of the obligations"** of said compensation law.

As a result of said election defendant in error had imposed upon it **new liabilities created by the act.** Both it and Freeborough were and **remained "under" that law.** By the terms of the statute said election resulted in the **removal of defenses** which but for the law it could have asserted. The evident purpose of the legislature in imposing these **new obligations** upon employers was to induce them to assume the obligation to pay "compensation" to their employees as fixed by the statute. Presumptively therefore the penalties imposed upon employers because of their rejection of statutory "Compensation" were, in the contemplation of the legislature, **equal to or greater than** the "compensation" burden. Otherwise of course employers would not agree to pay "compensation". The legislative scheme would be abortive. Hence **from the point of view of an insurer,** an employer who refused to pay a compensation would not be a better risk than one who did agree to pay "compensation."

Now, concededly, Freeborough would not have been covered by the policy if defendant in error had not rejected "compensation"; and he is no less excluded because defendant in error was willing to take

its chances on damage actions by Freeborough stripped of the defenses specified in the statute.

From an insurance standpoint one risk was as bad as the other, and hence both risks were excluded by the terms of the policy, unless defendant in error was willing to pay an additional premium to cover such risk, as it did in the case of other specified employees of defendant in error. All employees were excluded by the terms of the policy except those upon whose wages an additional premium was charged. There was in the policy both an express and implied exclusion of Freeborough.

## SPECIFICATIONS IN ERROR

### I.

That the Court erred in sustaining the motion of the defendant in error to strike parts of the amended answer of the plaintiff in error, to-wit: Paragraph eighteen of the said amended answer as shown on page eleven thereof, for the reason that the same stated a good defense to the complaint of the plaintiff.

The point to be urged here is that the said Freeborough was not a person engaged in the maintenance, care and upkeep of said building nor were his wages included in the premium and that therefore the

allegation in paragraph eighteen set up a good defense to the complaint.

II.

That the Court erred in overruling the demurrer filed by the plaintiff in error to the reply to the third, further and separate answer and defense which demurrer was for the reason that the said reply failed to set forth facts sufficient to constitute a reply to the third, further and separate answer of plaintiff in error.

Transcript, page 41.

The point to be urged under this assignment of error is that although the said Electric Company had elected not to contribute to the Compensation Commission of the State of Oregon, that this would not relieve the said Electric Company or the said Freeborough from all the provisions of the Compensation Law of the State.

III.

That the Court erred in making the following Finding of Fact, which is Number VIII in the Findings of Fact finally found by the Court:

Transcript, page 49.

"VIII.

That at the time and place of said accident, the said James A. Freeborough was a person cov-

ered by the terms of said Exhibit A under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant, under the terms of said Exhibit A, to investigate said accident, to defend this plaintiff against the claims of said James A. Freeborough, to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, and to pay and satisfy, to the extent of $7,500.00, any judgment rendered against the plaintiff in any suit by said James A. Freeborough, based upon his injuries resulting from said accident; that this plaintiff had no other insurance applicable to said accident or the claims of said James A. Freeborough arising therefrom;"

for the reason that the same was not justified by the evidence or admissions produced at the trial.

IV.

That the Court committed error in making the Finding of Fact as set forth in Paragraph XVIII, as follows:

Transcript, page 52.

"XVIII.

That in so denying liability under said Exhibit A and in refusing to investigate said acci-

dent and in refusing to settle the claims of the said James A. Freeborough to the extent of $7,500.00, as provided by said Exhibit A, and in refusing to defend said suit and in refusing to pay and satisfy said judgment to the extent of $7,500.00, as provided in said Exhibit A, and in refusing to reimburse this plaintiff for the expense incurred by it in the rendition of imperative, immediate medical and surgical relief to said James A. Freeborough, of the reasonable value of Four Hundred Nineteen Dollars and Seventy-five Cents ($419.75), this defendant has breached its said contract of insurance and by reason thereof this plaintiff has been compelled to pay and satisfy said judgment and to assume said expense of surgical and medical aid to the said James A. Freeborough, all as hereinbefore alleged, and thereby this plaintiff has been damaged and injured in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75); that the defendant refuses to pay the plaintiff said sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75), or any part thereof."

in that the evidence introduced in this action and the law applicable thereto did not justify the said Finding.

V.

That the Court committed an error in making the Finding of Fact as set forth in Paragraph XIX, as follows:

Transcript, page 53.

"XIX.

That Freeborough was not at the time of injury an employee of plaintiff, or otherwise under or subject to the Workmen's Compensation Act or Law of the State of Oregon."

for the reason that the same was not justified by the law nor by any evidence introduced at this trial.

VI.

That the Court erred in making Conclusion of Law as follows, to-wit: Conclusion of Law No. 1:

Transcript, page 53.

"1. That at the time and place of said accident the said James A. Freeborough was a person covered by the terms of said Exhibit A, under Agreement IV thereof and was not a person excluded by the terms of Agreement V thereof; that it became and was the duty of the defendant under the terms of said Exhibit A, to defend this plaintiff against the claims of said James A. Freeborough, resulting from said accident, and

to pay the expense incurred by the plaintiff in the imperative, immediate, medical and surgical relief of the said James A. Freeborough, to-wit, the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), and to pay and satisfy, to the extent of Seven Thousand Five Hundred Dollars ($7,500.00) a judgment rendered in the Circuit Court of the State of Oregon, for Multnomah County, wherein the said James A. Freeborough was the plaintiff and the Portland Electric Power Company was the defendant, which said suit was based upon the injuries to the said James A. Freeborough, resulting from the accident alleged in the complaint and covered by the said policy of insurance,"

for the reason that the said Conclusion of Law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

VII.

That the Court erred in making Conclusion of Law as follows, to-wit, Conclusion of Law No. 2:

Transcript, page 54.

"II.

That the defendant in refusing to pay said expense incurred by the plaintiff in the impera-

tive, immediate, medical and surgical relief of said James A. Freeborough, to-wit: in the aggregate sum of Four Hundred and Nineteen Dollars and Seventy-five Cents ($419.75), and in refusing to pay and satisfy the said judgment to the extent of Seven Thousand Five Hundred Dollars ($7,500.00) violated and breached its said contract of insurance, with the plaintiff, whereby the plaintiff was damaged in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75),"

for the reason that the said Conclusion of Law was not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

VIII.

That the Court erred in making Conclusion of Law as follows, to-wit: Conclusion of Law No. 3:

Transcript, page 54.

"III.

That the plaintiff should recover judgment of and from the defendant in the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75), together with its costs and disbursements herein,"

for the reason that the said Conclusion of Law was

not justified by the pleadings or any evidence introduced, or by any stipulation, nor warranted by law.

IX.

That the Court erred in giving a judgment order in favor of the said defendant in error, which was in words and figures as follows:

Transcript, page 55.

> "Based upon the findings of fact and the conclusions of law herein, IT IS ORDERED AND ADJUDGED that the plaintiff recover of and from the defendant, the sum of Seven Thousand Nine Hundred and Nineteen Dollars and Seventy-five Cents ($7,919.75) together with its costs and disbursements hereinafter to be taxed."

Under the specifications of error hereinabove set forth covering those numbered three to nine inclusive, this plaintiff in error claims that the said findings were improper because the policy of insurance referred to and the pleadings, the admissions, and the evidence, all show that the said Freeborough was not a person who was covered by the insurance policy for the following reasons:

(a) That the said Electric Company and the said Freeborough were subject to the provisions of the Compensation Law of the State of Oregon, and limitations therein contained, and

(b) That the said Freeborough was not intended to be covered by the said insurance policy and he was not engaged in the maintenance, care and upkeep of the Electric Building nor was the premium based upon his earnings.

## ARGUMENT

### I.

Defendant in error contends that Freeborough, its employee at the time of his alleged injury, was **not "under"** the Workmen's Compensation Act of the State of Oregon for the reason that it elected not to contribute to the Industrial Accident Fund. (See Paragraph II, Demurrer and Reply of defendant in error, Transcript page 39.)

Plaintiff in error on the other hand contends that the Workmen's Compensation Law of Oregon is more comprehensive, and that in either event the employer is **under** the law, and that no employer who comes **under** said law in the first instance can by his own act claim entire immunity therefrom.

Section 6614, Oregon Laws (as amended, Chap. 311, Session Laws 1921), provides, among other things:

> "All persons, firms and **corporations** engaged as employers **in any of the hazardous occupations**

hereafter specified **shall be subject to the provisions of this act;** provided, however, that any such person, firm or corporation, may be **relieved of certain** of the **obligations** hereby imposed * * * by filing * * * notice of an election not to be subject thereto * * * ."

Section 6615, Oregon Laws, provides as follows:

"All workmen in the employ of persons, firms or corporations who as employers are subject to this act shall also be subject thereto. * * *"

There is no dispute that in the first instance the defendant in error and Freeborough were subject to and **under** said law. But while an employer can be **"relieved of certain of the obligations imposed by the act"** he cannot be relieved of **all** of the obligations thereby imposed.

Section 6620, Oregon Laws, provides:

" * * * it shall be no defense for such employer (one who exercises an election not to contribute to the state fund) to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that the negligence of the injured workman, other than his willful act, committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had

knowledge of the danger or assumed the risk which resulted in his injury."

The insurance policy sued on contains the following provision found on the first page thereof:

"Exclusions. Agreement V. This policy shall not cover injuries or death,

* * * * * *

(6) To any employee of the assured **under** any workmen's compensation act or law."

The provisions of the policy (which is a general form applicable to all states) calls for an interpretation of the term **"under".**

This word was considered by the Supreme Court of Illinois in Re McWhirter's Estate, 85 N. E. 918-920, where it was contended that only certain parts of a statute were controlled or governed by other provisos therein contained. In answering the point then urged, the court said:

"We cannot agree with this view. The words **'under this act'** in the first proviso, show that the whole act is referred to, and not the preceding part of the section only."

Plaintiff in error contends that Subdivision (6) of Agreement V of the policy relates to the entire workmen's compensation act and not any particular feature of it.

To the same point is the case of Mills vs. Stoddard, 8 How. 345, 17 Dec. of Sup. Ct. U. S. 620-625, where a similar phrase was under consideration and the Supreme Court of the United States, speaking through Justice McLean, wrote:

> "That 'under the law' does not mean, 'in pursuance of it', or 'in conformity with it', but an act assumed to be done under it.
>
> The word 'under' has a great variety of meanings. But the sense in which it was used in the proviso is, 'subject to the law'. We are under the laws of the United States, that is, we are subject to those laws. We live under a certain jurisdiction, that is, we are subject to it."

Hughes vs. Doyle, 44 S. W. (Tex.) 64-65, interpreting a similar clause, held:

> "We do not think that the purpose of the use of the words **'under authority of law'** as first employed in the section, was merely to empower the Legislature to authorize the commissioner's Court to act in the premises, but that it was, rather, to make their action subordinate and subject to legislative control."

In Hostetter vs. City of Pittsburgh, 107 Pa. St. Rep. 419-431-432, the court considered the phraseology "shall arise under this contract" and determined:

> "the reasonable and manifest meaning and sense of 'under' in the connection in which it is used,

is 'the subject of' or 'covered by' the contract. This is not only the plain and palpable import of 'under' but it corresponds with the meaning of the word as given by both Worcester and Webster."

To similar effect is the holding of Shiras, J., in the case of Bates vs. Independent School Dist., 25 Fed. 192-194, where we read at page 194:

"The recital relied upon in the present case is that the bonds were issued 'under provisions of sections 1821, 1822, and 1823, of the Code,' etc. Does the word 'under' mean the same as the phrases 'in pursuance of,' 'in conformity with,' 'by virtue of,' or 'by authority of'? These all fairly imply a compliance with the provisions of the statute, because it cannot be justly said that bonds issued in violation of a statute are issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute thus violated. The word 'under,' however, has a different signification. Primarily it is the correlative of 'over' or 'above,' and signifies being in a lower condition or position; and, secondarily, it indicates a relation of subjection or subordination to some superior power, higher authority, or controlling fact. Thus, when it is said that the citizens of a given state are living under the constitution and laws of the state, it is not asserted

that all such citizens are living in conformity with such constitution and laws, but only that they are subject to such constitution and laws. They may live under them and conform thereto, or may live under and violate them. When it is asserted that certain bonds are issued in pursuance of, or in conformity with, the provisions of a given statute, this is an assertion that in issuing the bonds the provisions of the statute have been followed or conformed to; but when the recital is only that the bonds are issued under the provisions of a given statute, this simply asserts that the bonds are subject to or controlled by the provisions of the statute named; or, in other words, the purchaser is thereby informed where he should look in order to learn what the provisions of the statute are which confer and limit the power to issue the bonds."

It is the contention of the plaintiff in error that notwithstanding defendant in error elected not to **contribute to said fund** in order to secure so-called compensation payment to its employees who might receive injuries, it and the employee, Freeborough, were **"under the terms of said compensation act"** which imposed obligations on the defendant in error **not imposed prior to the passage of said act.** (Sec. 6620, Oregon Laws.) The insurance policy in question is a "general liability policy" which covers all

persons except those named in Agreement V, said exceptions including employees in states which have compensation laws, which either impose on the employer an obligation to pay compensation or other obligations in the event of an election not to pay compensation. In such states employees are excluded by this form of policy except such as are specifically named in the policy, and for whom a premium is charged.

It makes no difference whether under a compensation law the employer elects to disclaim compensation, he and his employees are still under the "compensation" statute. In either case his employees are excluded by the terms of the insurance policy because if the employer does not elect to accept compensation obligation, he is still "under" the act, and has imposed upon himself other obligations which are just as, or even more, onerous than the compensation obligation. (The removal of the common law defenses.)

An employee, as in the case of Freeborough, becomes a preferred litigant "under" the compensation law where an employer disclaims the compensation feature. Such an employee has greater rights than he theretofore had; rights superior to the public. It makes no difference whether the employer elects to contribute to the fund provided for under the compensation act or not, he and his employees are still under the compensation law. It is for this reason

that employees, wherever compensation laws exist, whether optional or not, are excluded from the policies; the right to elect to disclaim compensation imposes upon the employer **equivalent or greater burdens** which inure to the benefit of the employee. Therefore, it is wholly immaterial whether the compensation law has or has not an option proviso. In either case the employer and employee are **"under"** the act. Hence it made no difference in this case that the defendant in error disclaimed the "compensation" **feature** of the law. This "compensation" (so-called) law **is more than a law providing for the payment of compensation.**

The election on the part of the employer not to avail itself of the compensation **feature** does not result in his ridding himself of the **obligations imposed upon him** by the terms of the so-called "compensation" law nor deprive the employee of the **benefits bestowed upon him under the act.**

It is because of such new obligations, **whether in the form of obligation to pay compensation** or **because the employer is stripped of his common law rights and added privileges are given to the employee** that an additional premium charge is made where employees are covered by the policy.

Freeborough was not in the same position "as if this act had not been passed." He was **"under"** the act

and by virtue thereof was in a **superior position** and was put there **by the terms of the act.** We reiterate that defendant in error **cannot reject the act.** It cannot possibly free itself from the **entire obligations which the act imposes upon it.**

Freeborough and his employer were subject to the law. They were within the jurisdiction of that law and were subject thereto. Their conduct and their actions were subordinate and subject to and **"under"** its control.

The policy exception (general in terms and intended by the insurer to apply to all states) is not aimed at the **compensation feature of the act.** It is aimed at the **entire act.** The exception is perfectly clear and relates "to any employee of the insured **under any workmen's compensation act or law,"** and as said by the Supreme Court of Illinois in Re McWhirter's Estate, supra:

> "The words 'under this act' in the first proviso, show that the whole act is referred to, and not the preceding part of the section only."

It can not be denied that there is a "compensation law" in Oregon regardless of whether the employer pays compensation or not, and necessarily the defendant in error and Freeborough were "under" the act and by virtue of the plain exception of the policy

in question Freeborough was excluded from the provisions thereof.

The exception in the policy does not mention or refer in any wise to the acceptance or rejection of the optional feature of any workmen's compensation law, and we do not see how it can be seriously contended that Freeborough as well as the Electric Company were not under the act in question.

> "That 'under the law' does not mean, 'in pursuance of it' or 'in conformity with it', but an act assumed to be done under it.
>
> "The word 'under' has a great variety of meanings. But the sense in which it was used in the proviso is, 'subject to the law'. We are under the laws of the United States, that is, we are subject to those laws. We live under a certain jurisdiction, that is, we are subject to it."
>
> Mills vs. Stoddard, 17 Dec. Sup. Ct. U. S. 620, 625.

The compensation law was superior and paramount to the rights and liabilities of the defendant in error and Freeborough and their activities were in subordination to its provisions.

Defendant in error has erroneously assumed that when the employer refuses to contribute to the State Compensation Fund that the Compensation Law is

at an end **and has no application whatsoever.** But of course hazardous occupations coming under the law are still affected by it; for it provides for **benefits to employees and for the removal of defenses which but for the act the employer could assert.**

The employer has two options under the compensation law, one is to contribute to the fund and have the state pay the compensation, and the other to refuse to contribute to the fund and run the risk of damage actions with specified defenses removed.

Freeborough was an employee of defendant in error and it elected not to contribute to the state fund and the result is that it has had certain of its defenses taken away, and this is **under** and by virtue of the compensation law of the State **and the Compensation Law governs the situation and determines all rights of the parties before and after such election.**

II.

Another consideration that strongly reinforces the position taken by the plaintiff in error is that by the terms of the policy, **certain designated employees were covered and an additional charge made for such coverage.**

It is provided in "Condition A" of the policy:

> "The premium for this policy is as expressed in Item 3 of the declarations except as this policy

> covers injuries * * * to employees of the assured, in which case, **as to such coverage** the premium is based upon the entire remuneration * * * earned during the policy period by all persons employed by the assured in the said business operations as expressed in Item 3 of the declarations."

This clause clearly demonstrates that the policy in question was not intended to include employees **except as particularly specified therein** and (to use the language of "Condition A") **"as to such coverage"**, which can only mean coverage as to employees of the assured, the premium for such coverage is based upon the entire remuneration

> "earned * * * by all persons employed by the assured in the said business operations as expressed in Item 3 of the declarations." (Transcript, page 12.)

Item 3 of the declarations refers to employees **"engaged in the maintenance, care and upkeep of the building".**

There is no contention that the salary or compensation paid to Freeborough is included in the "estimated remuneration of employees" set forth in said Item 3 at $6000.00.

Condition A provides that the employees and only the employees whose remuneration is set forth in

Item 3 of the declarations are the ones covered by the policy, because the only premium charged for covering employees are those mentioned in Item 3 of said declaration and whose estimated remuneration amounts to only $6000.00.

Condition A clearly shows that the interpretation of Clause (6) of Agreement V herein urged is the only sound and consistent interpretation that can be placed on it. The language of the **exclusion** is plain as excluding any employee **under** any workmen's compensation act or law, and we contend, Oregon being a state in which there exists a "compensation" law, all employees except those specified in the policy were excluded.

In conclusion the plaintiff in error contends that there is no responsibility upon its part under the policy for two reasons:

(a) That the policy does not cover injuries to employees of the assured under any workmen's Compensation Law of Oregon or any other state.

The compensation law of Oregon applies in all phases of this case at all times as between the employee, the assured Electric Company and the plaintiff in error, and notwithstanding that the Electric Company had elected to be relieved of **certain** responsibilities of the act (see Oregon Code, Section 6614) still the parties were subject to the provisions

of the act, and a provision of the act that still remained, and was obligatory upon all the parties, was that the employer Electric Company, and incidentally the plaintiff in error, would be stripped of all of the common law defenses.

(b) That said Freeborough was not within the terms of the policy because Condition A of the policy provides that the premium is as expressed in Item 3 of the Declarations and that as to coverage the premium is based upon the entire remuneration earned during the policy period by the persons described in Item 3 of the Declaration. Item 3 of the Declarations covers only those engaged in the maintenance, care and upkeep of the Electric Building at the rate of five cents for every one hundred dollars of wages paid and the estimated wages for such employees was $6000.00 per year. Freeborough was not employed in the Electric Building, but was only there temporarily and it is admitted that he was not engaged in the care, maintenance and upkeep of the Electric Building; and it is also admitted that his wages were not included within the $6000.00 estimated remuneration.

We submit it is an irresistible conclusion that Freeborough was not an employee covered by this policy, and also that all of the parties at all stages of the controversy were governed by and were under the

Compensation Law of the State of Oregon. The judgment should therefore be reversed.

Respectfully submitted,

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